HON'BLE SRI JUSTICE BILAL NAZKI
AND
HON'BLE SRI JUSTICE S.ANANDA REDDY

WRIT PETITION No.17984 of 1996

Date: 05-07-2007.

Between :

M/s.Procter & Gamble India Limited, Hyderabad.

.....Petitioner

And

The Commercial Tax Officer, Ferozguda Circle,
Hyderabad & another.

.....Respondents.

HON'BLE SRI JUSTICE BILAL NAZKI
AND
HON'BLE SRI JUSTICE S.ANANDA REDDY

WRIT PETITION No.17984 of 1996

ORDER : (Per Hon'ble Sri Justice Bilal Nazki)

This writ petition was filed on 27th of August 1996 and it came up for admission on 28th of August 1996. There was an application for interim injunction, but no order was passed on that day. The petitioner, without waiting for the disposal of the writ petition and without withdrawing the writ petition, availed the remedy of appeal and filed appeal on 31st of August 1996 before the appellate authority. In the meantime, this writ petition remained pending in this Court and on 3rd of September 1996, this Court, by somewhat a detailed order, stayed the penalty orders which were impugned in the writ petition. The appeal, in the meantime, which was also pending before the appellate authority, came to be dismissed on 15th of April 2000. The appeal was not dismissed on merits and merits of the appeal were not considered in view of the fact that the writ petition was

pending in this Court and this Court had granted stay. The Course adopted by the petitioners can only be condemned as writ petition was filed in this Court and on not getting the interim orders, an appeal was also filed and both these remedies were kept till the appeal was finally dismissed by the appellate authority on the ground that High Court was seized of the matter. We would have not normally decided this writ on merits, but for two reasons we feel that the petitioner may suffer, one of the reasons being this Court has entertained the writ petition in the year 1996 and second reason is that because of pendency of this writ petition, the petitioner has already lost his appeal. Therefore, if this writ petition is not disposed of on merits and is dismissed, the petitioner will be rendered remediless.

In this background, we have heard Mr.L.Nageswar Rao, the Senior Advocate appearing for the petitioner and also the learned Special Government Pleader for the Commercial Taxes.

The order impugned in this writ petition is an order passed on 25.07.1996 imposing penalty in terms of Section 5-B (2) of the Andhra Pradesh General Sales Tax Act, 1957 (for short 'the Act'). This order was passed after a show cause notice and a reply to that notice by the petitioner. The show cause notice was primarily based on a report of inspection and the facts narrated in the show cause notice or the impugned order are not disputed by

the learned counsel for the petitioner. Therefore, we proceed in the matter on the assumption that the facts as narrated in the impugned order are correct and these facts reveal that the petitioner had filed a declaration and obtained a certificate in terms of the Act and relevant Rules to pay the tax in terms of Section 5-B (2) of the Act at concessional rates on certain articles, but on inspection, it was found that out of seven products those had been declared by the petitioner, he was only manufacturing in his own Company two products and five products were being manufactured on a Job-work arrangement by other five Companies; namely M/s.Espae Industries and Chemicals, M/s.Elegant Chemicals Private Limited, M/s.Natural Health Products Private Limited, Parson Acia Limited and M/s.Sampre Nutritions Limited. The Revenue felt that since the manufacturing activity of five products for which a declaration had been made by the petitioner were not being done by the petitioner, but was being done by the above named five Companies, the petitioner was liable to be penalised in terms of Section 5-B (2) of the Act. The learned senior Counsel appearing for the petitioner, however, submits that the penalty cannot be imposed merely on the ground that the petitioner was not manufacturing all the products in his factory unit, but was getting them manufactured through a Job-work basis.

The controversy is very short and it revolves around

the interpretation to Section 5-B (2) of the Act. The learned counsel for petitioner submits that Section 5-B (2) of the Act envisages two situations where penalty can be imposed. The first situation is where a person has no manufacturing unit and sells the raw-material obtained by him by paying sales tax at a concessional rate and the second situation is where a dealer has a manufacturing unit, but sells the raw-material which is obtained by him by paying sales tax at a concessional rate. He submits that the petitioner does not fall in either of the categories.

Before considering this argument, it would be necessary to have a look at Section 5-B (2) of the Act, which reads as under—

> *"**5-B(2) If any dealer,--***
>
> *(i) not having his manufacturing unit within the State purchases any goods by furnishing a declaration under the proviso to sub-section (1); or*
>
> (ii) *having his manufacturing unit within the State and having purchased goods by furnishing a declaration under the proviso to sub-section (1) sells such goods contrary to such declaration, the assessing authority, may after giving such dealer a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum which shall not be less than three times but which may extend to five times the amount of tax leviable on the sale of such goods so purchased."*

From bare perusal of this Section, it becomes crystal clear

that a manufacturing unit within the State having purchased goods by furnishing a declaration under proviso (i) to Section 5-B (2), should sell such goods contrary to the declaration before it becomes liable to pay the penalty. The learned counsel has drawn our attention to the declaration made by the petitioner and to the certificate issued by the Department in terms of Forms 'G', 'G1' and 'G2'. Form 'G2' contains the Certificate of Registration as Manufacturer under Section 5-B of the Act. It only imposes a condition, which is, *"The manufacturer shall use/consume the raw materials, component parts, sub-assembly parts, intermediate parts, consumables and packing materials noted below in the manufacture of finished products noted at above."*

These Forms i.e. Forms G, G1 and G2 and the condition forming part of Form G2 make it further clear that there is no restriction of engaging other Companies for production of the goods and the only restriction is that the goods purchased at a concessional rate should not be sold, but should be consumed for the purpose of manufacturing of the goods for the purpose for which a declaration has been made by an assessee under Section 5-B of the Act. However, the learned counsel for respondents relies on a judgment of this Court reported in **Emjak Industries Limited v. CTO**[1]. This was a case, where the petitioner was a manufacturer under Section 5-B of the Act. In the present case, this question does not

fall for consideration, as admittedly, the petitioner is a manufacturer within the meaning of Section 5-B of the Act. However, the learned Government Pleader further submits that in para 30 of the judgment, some principles have been laid down, which would govern the present controversy also. Para 30 reads as under—

> "In interpreting the specific language employed in section 5-B of the Act, which requires that in order to claim the benefit of concessional rate of tax the dealer should have his manufacturing unit within the State, the decisions of the Orissa, Bombay and Allahabad High Courts, relied upon by the petitioners, are of no relevance after the deletion with effect from January 21, 1989, of rule 3(gg) of the A.P.General Sales Tax Rules which defined the expression "manufacturer". None of these decisions deal with the question as to what is meant by the words "having his manufacturing unit". A plain meaning of these words, in the context in which they occur, is that a person in order to claim the benefit of section 5-B, must have a manufacturing unit either of his own or over which he has exclusive control. With respect, we agree with the view of the Kerala High Court in Palghat Oil Mills v. State of Kerala [1987] 65 STC 169. If in the unit, where the finished goods are manufactured, some others also have control, it cannot be said to be "his manufacturing unit". Obviously the objective behind incorporating this condition in section 5-B of the Act, to start his own manufacturing unit or to take on lease with exclusive control a manufacturing unit. This would facilitate employment opportunities, generate wealth and also augment the revenues of the State, since any unit that comes into being has to pay taxes under various enactments. The petitioners in both the writ petitions do not have exclusive control over the manufacturing unit in which the biscuits are manufactured and so we hold that as each of them does not have "his

> manufacturing unit", within the meaning of sub-section (2) of section 5-B of the Act, and they are not entitled to be registered as manufacturers under section 5-B. It is relevant to notice that form G1 which is required to be filed by the dealer under section 5-B contains column (2), under which it is obligatory on the part of the dealer to disclose the name and full postal address of the factory and the place of manufacturing concern."

After going through this judgment, we do not find ourselves in agreement with the argument made by the learned Government Pleader that this judgment would guide in disposing of the controversy before us, because, in our view, what is required before imposing an order of penalty under Section 5-B (2) for a person who has a manufacturing unit in Andhra Pradesh, is that he should sell the goods he had purchased by availing the concessional rate of tax under Section 5-B of the Act. There is not even an allegation that the petitioner had sold any goods purchased by him as raw material after paying the sales tax at concessional rate. By merely assigning the job of manufacturing of some of the goods declared by him to some other Companies, he would not be liable to be penalised.

The learned Senior Counsel for petitioner has further drawn our attention to a catena of authorities to say that the Fiscal Statute should be strictly interpreted. Suffice is to refer to a judgment of Supreme Court in **Commissioner of Central Excise v. Acer India Limited**[2], which has referred to many earlier judgments.

He has also submitted that there should be always an element of *mens rea* before an order of penalty is imposed and in the present case, even in the order impugned or in the notices issued prior to that, nowhere it has even been suggested by the respondents that the petitioners had made arrangement with other Companies to manufacture some of the goods in order to avoid payment of any tax. Therefore, in the absence of any *mens rea*, even if there had been any mistake, it was a *bona fide* mistake. In this case also, he has referred to a judgment of Supreme Court in **Cement Marketing Co. of India Ltd., v. Assistant Commissioner of Sales Tax**[3].

For these reasons, we allow the writ petition and quash the impugned order. No order as to costs.

BILAL NAZKI, J

5th July 2007

S. ANANDA REDDY, J

ajr

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[1] 97 STC 173

[2] (2004) 8 SCC 173

[3] (1980) 1 SCC 71